

**DEQ – Air Quality Division**  
**SUMMARY OF NEGOTIATED RULEMAKING**  
**DAIRY PERMITTING RULEMAKING**  
**DOCKET No. 58-0101-0502**  
**June 10, 2005**

**PARTICIPANTS**

Arrington, Paul – J. R. Simplot Co.  
Bauer, Martin – DEQ  
Bilderback, John – ISDA  
Brown, Cashia - Elmore County  
Carlson, Rich – Idaho Rural Council  
Conder, Jim – Private Citizen  
Eddie, Bill – Advocates for the West  
Hayes, Justin – Idaho Conservation League (ICL)  
Haynes, Claudia - Canyon County  
Heitman, Phyllis – DEQ  
Johnson, Della  
Knight, Lloyd – Idaho Cattlemen's Assoc.  
Kronberg, Lisa – Attorney General's Office  
Louks, Bruce – DEQ  
McClure, Ken – Givens Pursley  
McLean, Lauren – Idaho Conservation League  
Naerebout, Bob – Idaho Dairywomen's Assoc.  
O'Riordan, Hugh – Givens Pursley  
Olmstead, Brent – Milk Producers of Idaho  
Parks, Ron – J. R. Simplot Co.  
Patten, Marv – ISDA  
Sheffield, Ron – University of Idaho  
Simons, Mike – DEQ  
Smith, B.F. "Toy" – Northwest Dairy Assoc.  
Smith, Ed – private citizen

**DRAFT RULE AND RULE STRUCTURE**

Lisa Kronberg, Deputy Attorney General, presented the draft rule (see attached) for preliminary discussion and explained each section. During a telephone discussion with Bill Eddie, Hugh O'Riordan, Ken McClure, and Lisa Kronberg, it was decided the best way to structure the dairy rule would be as a permit by rule (PBR). Ms. Kronberg prepared the draft rule and fashioned it similar to the Rock Crusher PBR.

Technical language needs to be developed for Section 762 to clarify volatilization and animal units. Information from Table 1 of the Technical Report attached to the rulemaking request will also be added to provide clear definitions.

DEQ will prepare a draft application form for the Internet for the group's review. Justin Hayes, ICL, expressed concern that adequate information be included with the form. He supported having each dairy prepare a proposal or plan on how they would comply with the rules. He felt it was not appropriate to just assume that everything would be fine. Martin Bauer explained this was an inspection/compliance issue that would be handled through the inspection process similar to the way fugitive dust is handled. He added that DEQ does not have the resources to review and approve such plans. Justin Hayes feared this process might result in more work for DEQ through legal challenges and requests for information as ICL and concerned citizens try to find out what is happening. Mr. Hayes also believed such an approach would result in many facilities being out of compliance in the initial inspection because they had not received feedback and guidance from DEQ regarding their plan. Mr. Bauer responded DEQ plans to address this concern through education and outreach.

Lisa Kronberg suggested an initial inspection be performed to determine compliance right after registration when the facility goes into operation. Marv Patten, ISDA, explained ISDA has an existing inspection process used to evaluate compliance with sanitary inspections. It provides a computer tracking program and a 100 point inspection process. A similar process could be developed for the initial inspection.

Claudia Haynes, Canyon County, discussed her concerns about dairies being able to change their operation after a Nutrient Management Plan (NMP) is submitted and a conditional use permit is issued by the county based on that NMP. The changes can have a major effect on the air and water in the area. She questioned how the DEQ rule process could respond to such changes. Marv Patten, ISDA, explained that NMPs are working documents subject to change due to influences such as weather, crop pricing, etc. Facilities need the flexibility to make modifications to respond to these influences, while still complying with the requirements. They must go through the appropriate process to make the modifications, and it must be accurate.

Claudia Haynes stated if Section 764.01 is changed to add the requirement for an initial qualifying inspection, and a facility cannot change its operation from its initial NMP without going through the DEQ Permit to Construct process again; then the rule works as it should. If those clarifications are not added, she felt the rule would not work as it should.

Martin Bauer thought Marv Patten's idea of developing an initial qualifying inspection that mirrors the existing ISDA process sounded promising. DEQ will do further investigation and possibly develop language for the next draft rule. They will also look into the NMP rule to see if it could tie into this rule to address some of these issues.

The purpose of having Section 761 in the rules was questioned. Lisa Kronberg explained Section 761 was included in the rule to restate existing rules so someone looking at this rule would know what they needed to comply with in one document. There was concern that Section 762 might be read to exempt smaller dairies from those existing generic requirements that apply to everyone. Some felt it was confusing, and Section 761 should be deleted from the rule.

Claudia Haynes supported leaving Section 761 in the rule because it provides a yardstick for people to go by. It is functional and makes it clear what laws have to be complied with. Lisa Kronberg suggested clarifying language be added to Section 760 to read, “compliance with these sections does not relieve the owner or operator of a dairy from the responsibility of complying with all other federal, state, and local applicable laws, regulations and requirements including IDAPA Section 58.01.01.161, and 650 and 651.” The laws stated in Section 761 would then be included in this rule without having to be restated in full. The group agreed to the suggested change.

Marv Patten suggested language be added to define dairy farm as “a facility licensed to sell raw milk for human consumption.” Lisa Kronberg will add the definition.

The group discussed whether the name of the rules should be changed to state they were rules for the control of ammonia produced from dairy sources. It was pointed out that while the rulemaking was triggered by ammonia, the best management practices (BMPs) in the rules would address other air pollutants as well and were in fact air pollution rules. Lisa Kronberg suggested the rules be called the Rules for Dairy Best Management Practices. Language will be drafted for further comment at the next meeting.

Marv Patten asked if the term “modification” should be defined in Section 763. The term is defined in the air rules as any physical change or change in the method of operation that would increase pollutants to which a standard applies. Lisa Kronberg felt that definition did not really fit this situation and questioned the need to have the first sentence of Section 763 regarding modifications in the rule. She will develop alternative language.

Hugh O’Riordan asked if language should be added at the beginning of the rule to state that the numbers used in the rule were developed through negotiations and were the product of best available science. Martin Bauer felt this information was best presented in a separate document. It is also in the notice and will be presented before the Board of Environmental Quality.

Lisa Kronberg stated the entire table of BMPs with associated points would be inserted into Section 765. Dairy Best Management Practices. The total number of points needed has not yet been determined. New BMPs and associated point values may be added in the future. The best mechanism to update these

additional BMPs was discussed. DEQ will investigate the following suggestions and issues and bring the matter back for discussion at the next meeting:

- Referencing a third party document such as a university research bulletin.
- Investigation to consider the rule versus guidance issue.
- Including the wording, “or other BMPs as approved by the Director.”
- Including a public comment and participation process.
- Reconvening the negotiated rulemaking group to consider new BMPs.

Lisa Kronberg will add language to Section 763 to provide a mechanism for smaller dairies who do not meet the threshold to voluntarily take part in the program and receive a PBR.

Section 764.02 Monitoring and Recordkeeping Requirements were discussed. Ms. Kronberg envisioned creating a form that would be on the Web site that facilities could follow. Ken McClure was concerned that facilities might be denied points because they could not demonstrate compliance through recordkeeping. He emphasized that individuals working on the dairies might not be used to detailed recordkeeping processes and would be unduly burdened by such a requirement. Justin Hayes stressed the importance of good recordkeeping and felt the addition of a recordkeeping form would not be a problem because dairymen are used to performing detailed recordkeeping processes for milk production and other issues.

Ron Sheffield pointed out this is a performance based regulation with high expectations. It is not loosely defined like nutrient management where you gauge compliance through inference rather than direct measurement. This rule will allow direct measurement because expectations are clearly set out. For BMPs that are somewhat nebulous, and there is no clear way to see it is being done, the facility should propose a means of documentation so they can get credit for it. He felt there would be a higher level of compliance with this type of process.

Martin Bauer listed the types of BMPs that could not be clearly demonstrated and would probably need documentation:

- Scrape built up manure
- Harrowing
- Surface amendments
- Alum incorporation
- Animal nutrition

The group discussed the pros and cons of having self-certifying, inspection, or monitoring and recordkeeping regulation.

Martin Bauer stated his understanding of the proposal was to have an initial qualifying inspection, if it can be developed similar to the existing ISDA inspection process, and the dairy farms will be responsible for putting together a plan that states they meet the required number of points and how they are earning those points. There would be an updated plan in place on-site any time an inspector visited and wanted to know how the facility was meeting the necessary number of BMP points. Ken McClure responded the dairymen did not want to be required to have a plan in place—the initial inspection will verify compliance and subsequent inspections will verify continuing compliance.

Marv Patten briefly discussed enforcement and penalty issues. He stressed the goal was to improve air quality conditions for ammonia and to bring facilities into compliance in the most reasonable way, while maintaining the confidence of the public and the ICL. He believed the inspection process would achieve those goals.

Mr. Patten also questioned if any points would be given for partial performance of a BMP. Is there a mechanism for addressing grey areas when it comes to compliance? Martin Bauer stated these issues would be addressed more fully later in the rulemaking. He envisioned that enforcement actions would be taken after fully exhausting all compliance assistance. DEQ will exercise discretion in this phase and work with the facility. They will reserve fines for egregious violators. DEQ is still in discussions with ISDA and the Attorney General's office to determine how the compliance, enforcement, and penalty phase will be handled.

Ron Sheffield pointed out that Section 765.01 needed a change in wording to reflect that the table lists ammonia control practices, not best management practices. Lisa Kronberg will make the change to read "Best Management Practices for the Control of Ammonia."

Martin Bauer recommended that since it seemed unlikely the group would find a solution at this time to the question of whether a plan would be required and how updates would be handled, they move forward with updating the draft rule with the changes discussed and revisit the issue at the next meeting.

Justin Hayes pointed out that Section 765.02 Monitoring and Recordkeeping Requirements had not been discussed. Martin Bauer reminded they had discussed the possibility of putting the monitoring and recording language in 01, and putting language that compliance is determined through inspection process in 02. Mr. Hayes stressed his concern that information be available upon request. Marv Patten said the inspection sheets would be housed at the ISDA and would be available to the public. Mr. Hayes asserted that ICL and the public should have access to whatever documents or records it is decided would be required. Martin Bauer clarified the information request could be made to DEQ and they would then obtain the information from ISDA and give it to the

requesting party. Marv Patten pointed out that information housed at ISDA is public record, but records stored at a dairy farm are a different matter. The Supreme Court has not yet made a decision on whether that information is public record. Justin Hayes said under current law, ICL has access to records stored at the farm and has prevailed in court over this issue. He emphasized that he wanted to maintain the same level of access under this rulemaking.

Martin Bauer stated these issues would be revisited at the next meeting. The revised draft rule will be distributed to members prior to the meeting.

### **BEST MANAGEMENT PRACTICES**

Martin Bauer noted some of the BMPs needed additional clarification on frequency and guidance principle. Ron Sheffield will work on clarifying language and try to have it ready for the next meeting. Some additional BMPs will also be added.

### **UPDATE ON DAIRY SURVEY PROCESS**

Martin Bauer stated there was no update on the dairy survey process at this time. The dairy tour was conducted and the survey sheets were used. He thanked Bob Naerebout for organizing the tour. The tour was very successful and the group learned a great deal in a short amount of time. Another tour may be scheduled after the BMPs are updated.

### **UPDATE ON INSPECTION/COMPLIANCE PROCESS**

Martin Bauer reported he met with Marv Patten and discussed ideas on inspection and compliance issues. The matter needs more legal review to determine authority issues. Once these questions are resolved, ISDA and DEQ will meet to develop a more final format.

Ken McClure asked if an Attorney General's opinion had been requested on the matter. Mr. Bauer responded no formal opinion had been requested; they are currently researching the authority of both agencies.

Martin Bauer discussed changing the rulemaking to a temporary rulemaking. The group reached consensus on the change in previous discussions. Mr. Bauer supported the change and will prepare the documents needed to get the Governor's approval for the temporary rulemaking. If granted, this change would make the rule effective as soon as it is approved by the Board of Environmental Quality—it would not have to go before the Idaho Legislature before becoming effective. If the rulemaking proceeded on the regular rulemaking track, the negotiated rulemaking would have to be completed by the end of July in order to be effective in the next legislative session. At this point it does not appear possible to complete the rulemaking by then. The temporary rule will expire at the end of the legislative session, but there is a process to ask the legislature to extend the rule.

Justin Hayes supported having a temporary rule, but felt a final rule should also be submitted to the upcoming legislature for approval, so the rulemaking process is not extended another year. Martin Bauer acknowledged the need to wrap up the rulemaking process in a timely manner, but felt it was most important to make sure the rule is done right and not rushed. Mr. Hayes noted the temporary rule process did not include a public comment process.

#### **SCHEDULE AND AGENDA FOR FUTURE MEETINGS**

The next negotiated rulemaking was scheduled for June 29, 2005 from 9:00 a.m. at the DEQ state office in Boise. The agenda will include the following items for discussion:

- Draft rule
- BMP additions, clarifying language, and points

## **ATTACHMENT 1**

### **PRELIMINARY DISCUSSION DRAFT – 6-7-05 TEXT OF RULE DOCKET 58-0101-0502 VERSION 1**

#### **760. RULES FOR THE CONTROL OF DAIRIES.**

The purpose of Sections 760 through 765 is to set forth the requirements for certain size dairies. Compliance with these sections does not relieve the owner or operator of a dairy from the responsibility of complying with all other federal, state and local applicable laws, regulations, and requirements.

#### **761. GENERAL CONTROL REQUIREMENTS.**

**01. Prohibition.** No owner or operator of a dairy shall allow, suffer, or cause the emissions of any air pollutant to the atmosphere in such quantity of such nature and duration and under such conditions as would be injurious to human health or welfare, to animal or plant life, or to property, or to interfere unreasonably with the enjoyment of life or property.

**02. Control of Fugitive Dust.** In accordance with Sections 650 and 651, owners and operators of dairies shall take all reasonable precautions to prevent the generation of fugitive dust. In determining what is reasonable, consideration will be given to factors such as the proximity to human habitations and/or activities and atmospheric conditions which might affect the movement of particulate matter.

#### **762. GENERAL APPLICABILITY.**

The requirements of Sections 760 through 765 apply to the following size dairies:

##### **SUMMARY: Animal Unit (AU) or mature cow threshold to produce 100 ton NH<sub>3</sub>/year**

| <b>Cow basis (1400 lbs)</b> | <b>Drylot</b>                                      | <b>FS/Scrape</b> | <b>FS/Flush</b> |
|-----------------------------|--|------------------|-----------------|
|                             | <b>Total cows (100 t NH<sub>3</sub>) threshold</b> |                  |                 |
| No land app                 | 5063   | 2781             | 1638            |
| 27% volatilization          | 4887   | 2733             |                 |
| 80% volatilization          | 4569   | 2643             |                 |

#### **763. PERMIT BY RULE.**

No owner or operator may commence construction, modification or operation of a dairy described under Section 762 without first complying with Sections 763 through 765. Owners and operators of dairies shall be deemed to have a permit by rule if they comply with all of the applicable provisions of Sections 760 through 765. Nothing in Sections 760 through 765 shall preclude any owner or operator from requesting and obtaining an air quality permit pursuant to Section 200.

#### **764. REGISTRATION FOR PERMIT BY RULE.**

**01. Registration Process.** Any owner or operator of a proposed new dairy shall register within fifteen (15) days prior to commencing construction.

**02.** Any owner or operator of an existing dairy shall register within fifteen (15) days of the effective date of Sections 760 through 765.

**03. Registration Information.** The following information shall be provided by the registrant to the Department:

- a. Name, address and telephone number.



- b. Information sufficient to establish that the dairy is of the size and type subject to these rules per Section 762.
- c. Registration forms for this submittal are available at [www.\\_\\_\\_\\_\\_](http://www._____.).

**765. DAIRY BEST MANAGEMENT PRACTICES.**

**01. Best Management Practice.** Each dairy subject to these rules shall employ best management practices to total \_\_\_\_ points. The following table lists available best management practices and the associated point value. As new information becomes available or upon request, the Department may determine a practice not listed in the table constitutes a best management practice and assign a point value.

**02. Monitoring and Recordkeeping Requirements.** The owner or operator of the dairy shall monitor and record the best management practices employed to total \_\_\_\_ points. Records of monitoring and recordkeeping shall be maintained at the site and available to the Department representatives upon request.